UNITED STATES
v.
JON ZIMMERS
CLAIRE KELLY

IBLA 83-429 Decided May 17, 1984

Appeal from a decision of Administrative Law Judge E. Kendall Clarke declaring the Lucky Strike lode mining claim and the Sunday Creek PMC #1, Sunday Creek PMC #2, and Sunday Creek PMC #3 placer mining claims invalid. CA-8265 and CA-9113.

Affirmed as modified.

1. Mining Claims: Generally -- Mining Claims: Location -- Mining Claims: Possessory Right -- Mining Claims: Surface Uses

Federal law requires that mining locations be made in good faith for the purpose of mining, processing, or prospecting for valuable minerals. Title to mineral lands cannot be acquired by occupancy unless for the prime purpose of mining and extracting minerals. Even if a discovery could be shown to exist, proof of bad faith can invalidate a claim, since in such a situation the mineral values are incidental to the purpose for which the land is claimed.

APPEARANCES: Jon Zimmers and Claire Kelly pro sese; Judy V. Davidoff, Esq., Office of the General Counsel, Department of Agriculture, San Francisco, California, for contestant-appellee.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Jon Zimmers and Claire Kelly have appealed from a decision of Administrative Law Judge E. Kendall Clarke, dated February 3, 1983, declaring the Lucky Strike lode mining claim and the Sunday Creek PMC #1, Sunday Creek PMC #2, and Sunday Creek PMC #3 placer mining claims invalid for lack of discovery of valuable mineral within the limits of said claims.

This is the second time that the same appellants have appealed to this Board from a decision finding mining claims invalid. The previous appeal was from a decision that a placer claim encompassing the same lands was invalid

for lack of a discovery. The Board affirmed that finding in a decision styled, United States v. Zimmers, 44 IBLA 142 (1979), aff'd, United States v. Zimmers, Civ. No. S-79-99 MLS (E.D. Cal. Feb. 25, 1981). The Lucky Strike claim was located prior to the determination by the Administrative Law Judge in the previous case and the placer claims were located the spring following the determination by this Board.

Following the location of the claims which are the subject of this appeal the Forest Service again requested that BLM bring actions to contest the claims. As a result, on July 17, 1980, a contest was initiated regarding the Lucky Strike claim (CA-8265) and on February 4, 1981, a contest was filed with respect to the placer claims (CA-9113). Answers were filed by appellants, the cases were subsequently consolidated, and a hearing was held in Portland, Oregon, on April 13 to 14, 1981. Following the hearing, a decision was issued and an appeal was timely filed by appellants.

Two allegations common to both complaints were that the claims were not located in good faith and that the claims were not supported by a discovery. The basis for the bad faith allegation was the information and belief that the claimants had not located the claims for the purpose of developing a mine but had intended to use the claim ownership as a basis for activities not related to mining.

[1] Federal law requires that mining locations be made in good faith for the purpose of mining, processing, or prospecting for valuable minerals. 1/ United States v. Zweifel, 508 F.2d 1150, 1153 (10th Cir. 1975). The all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of this country. Consequently, title to mineral lands cannot be acquired by occupancy unless for the prime purpose of mining and extracting minerals. Bagg v. New Jersey Loan Co., 354 P.2d 40 (Ariz. 1960), cited in United States v. Nogueira, 403 F.2d 816 (9th Cir. 1968).

In United States v. Nogueira, supra, the court considered facts similar to those now before this Board. A placer claim had been located "purportedly for fire clay." Minor excavation took place on the property shortly after location but there was no substantial proof of mining on the property since that date. Appellants were using the property as a residence. The court stated:

> The Act of July 23, 1955, 69 Stat. 368, 30 U.S.C. § 612, * * * expressed the policy of Congress to confine the use of mining claims for mining purposes, and was directed at abuses which had grown up in the use of such claims for other than mining purposes. The Legislative history demonstrates the purpose of the Act, and specifically refers to one of the abuses

1/ A claimant gains no rights as against the Government during exploration but does gain some limited rights as against third-party claimants under the doctrine of pedis possessio.

> as the acquisition of mining claims for "residence or summer camp purposes." H.R. 730, 84th Cong. 1st Sess. (1955), p. 6; S.R. 554, 84th Cong. 1st Sess. (1955). U.S. Code Congressional and Administrative News 1955 Vol. 2, 2474 at 2479.
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> United States v. Coleman, 390 U.S. 599, 88 S.Ct. 1327, 20 L.Ed.2d 170 (1968), involved the "marketability" and "prudent man test" as applied to mineral discoveries. But in discussing generally the mining laws, the Court said, at 602, at 1330 of 88 S.Ct: "Under the mining laws Congress has made public lands available to people for the purpose of mining valuable mining deposits and not for other purposes." The court then inserted footnote [4] as follows:
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> "17 Stat. 92, 30 U.S.C. § 29, provides in pertinent part as follows: 'A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person * * * having claimed and located a piece of land for such purposes * * may file * * *'. (Emphasis added.)".
>
> In this case there was ample evidence from which the trier of fact could have determined that the purported location in May 1961 was not for the purpose of exploring for and developing minerals; and ample evidence that the appellees entered upon and continued to occupy the premises for personal residence purposes and not for mining development at all.

United States v. Nogueira, supra at 823-24.

When expressing the absolute necessity for good faith on the part of the claimant in In re Pacific Coast Molybdenum Co., 75 IBLA 16, 90 I.D. 352 (1983), this Board said that "even if a discovery can be shown to exist, proof of bad faith can invalidate a claim, since in such a situation the mineral values are incidental to the purpose for which the land is claimed." Thus, it is readily apparent that if claims are not located in a good faith effort to develop a mine, the claims are void ab initio.

The concept that an entry can be canceled if it is found that title to the ground is not being sought for the intended purpose is neither new nor novel. In United States v. Elkhorn Mining Co., 2 IBLA 383 (1971), aff'd, Elkhorn Mining Co. v. Morton, (Civ. No. 2111 (D. Mont. Jan. 19, 1973), the Board found that charging admission for breathing the atmosphere of a mine tunnel did not constitute the use of property for mining purposes. It was never contemplated or intended that public lands might be possessed and held and title thereto acquired under the mining laws for purposes or uses nonessential to mining or mining operations. Grand Canyon Railway Co. v. Cameron, 36 L.D. 66 (1907). See also South Dakota Mining Co. v. McDonald, 30 L.D. 357 (1900) (bad faith entry by homestead claimant). In each of these cases the claimant had used the lands for purposes other than that for which entry was made. The mining of minerals from the claim must be the primary

purpose for the location of a claim. If it is the secondary purpose or used as a means of justification for the occupancy of the land, it is not a bona fide claim.

The record clearly establishes that appellants intended to use the site of the claims for a school. The lands were to be used by the "Cherry Flats project" which was described by Zimmers in the following manner:

> Q. Have you made any efforts -- what efforts have you made, if any, to find a market for materials on the four claims in contest? To some extent, I believe I just answered that with the last question. I think you are describing the general market. I'm asking you specifically what effort you've made to find a market?
>
> A. Well, my initial intention was to utilize the minerals myself or a company that I put together would utilize them to make ceramics.
>
> Q. What company is this?
>
> A. The name of the company at this time seems to be the Cherry Flat project.
>
> Q. How would they utilize the materials?
>
> A. Dig the clay and process it and dig the other minerals and process it and manufacture things from the minerals and also sell the minerals.
>
> Q. What is the purpose of the company?
>
> A. In general, it's a school, an educational organization.
> Q. Where is the school located?
>
> A. It's been using that cabin as a headquarters at this time, as a business address.
>
> Q. The cabin on the claims in contest today, that cabin?
>
> A. At least one of the claims, apparently.
>
> Q. Has the school actually been established? How large is the school?
>
> A. It's been established. We've basically been forced by the Forest Service not to be able to operate, so it's not operational at this time.

(Tr. 78-79).

Later, Zimmers further described the Cherry Flats project.

> THE COURT: All right. What is the Cherry Flats project you were employed with, is that a corporation?
>
> MR. ZIMMERS: It is a corporation, your Honor, it is an educational organization.
>
> THE COURT: Who is in it?
>
> MR. ZIMMERS: Myself and Claire Kelly and Matt Kemeny are the Board of Directors.

He also stated that:

> [A] large use of the materials would be in the Cherry Flats project which is a school, an educational organization and they were going to build the facilities to process the materials and clay and silica and feldspar and manufacture things out of it and sell things and also to process those minerals and sell the minerals to other potters.

(Tr. 224).

In discussing the "market" for his product Zimmers stated:

> Q. I believe you testified that primarily your market is going to consist of the Cherry Flats project?
>
> A. To a large extent, I also anticipate that the potters would come and pick up the clay themselves instead of wholesaling it.
>
> Q. There is a current market generated by the Cherry Flats project at this time or is it prospective?
>
> A. It turns out it is a prospective market because the Forest Service has our money withheld, we would be in operation by this time if the money hadn't been withheld, so it turns out it is a prospective market. I want to strike that or not say that. It is turned out that the Cherry Flats project is an existing business and it has existing funding to do this, the funding is tied up at this time.
>
> THE COURT: Will you explain how the funding is tied up, you alluded to it several times, how is it tied up?
>
> THE WITNESS: That is what those letters are I introduced, your Honor. The Cherry Flats project got a grant from the National Endowment of Arts, there was supposed to be a workshop in the

summer of 1979 and the mine was -- Harry Davis, who is an internationally known English potter --

THE COURT: How are the funds tied up?

THE WITNESS: That was one of the exhibits. The Forest Service wrote the National Endowment of Arts and told them that we were trespassing, the National Endowment of Arts wouldn't give us the money until the trespassing has been resolved, and I also wrote a proposal to the county CETA office for $85,000 for salaries and equipment to train people to work for us, you know, to become trained to be employees to process the clay and other materials, and the county CETA office wanted to know what the Forest Service thought of the project, and the Forest Service wrote and said we were trespassing. That was the purpose of the minutes, the county postponed ruling and deciding on our proposal until it's been resolved whether or not we are trespassing.

THE COURT: Okay. Go ahead.

BY MS. DAVIDOFF:

Q. Where is the Cherry Flats project, where is your school?
A. It is up in the area of the claims.

Q. Is it physically located on the claims?

A. It's been using the cabin as its office for a business address. (Tr. 23).

The exhibit referred to in the above quoted testimony was appellant's exhibit K-3. The stated purpose for the grant from the National Endowment of the Arts was "to support a ceramic workshop using early American methods of stoneware production and reliance on natural materials found in northern California" (Exh. K-3). It can hardly be said that this is the normal source for mining venture capital or that the conduct of a mining operation was the primary purpose for the grant.

Appellant initially had attempted to obtain title to the land as a townsite. In a letter written under the Cherry Creek project letterhead the authors stated that "we have some claims up the Trinity Alps road past Bridge Camp. The claims are for mining, townsite and school purposes" (Exh. K-4 (emphasis added)).

Appellants have occupied the lands encompassed by the claims for more than 5 years. In that time they built two cabins, a water system, and cut in excess of 50 trees from the lands. However, they have done little more than take a few samples from the claims. Photographic evidence presented by the

Forest Service graphically demonstrated that virtually no work had been conducted on the lode claim at the discovery site between the time of location and shortly before the hearing (Exhs. 11A through 11F). The only visible change was the presence of a log which had fallen across the alleged discovery point.

Zimmers testified that the placer claims were supported by a finding of gold. The basis for this determination was the result of sampling conducted by the mineral examiner. The assay of this sample indicated that the gold content of the gravel was 1.105 milligrams gold per cubic yard. Zimmers testified that this represented $2 to $2.25 per cubic yard, using $700 per ounce gold (Tr. 42-43, 46). In fact, however, this equates to $0.0249 per cubic yard, using the optimistic gold price used by Zimmers. He also testified that additional samples were taken by him and other parties but could not give any testimony about the result of this sampling, other than that he had found some gold in some of the samples (Tr. 47-48).

The other commodities claimed by Zimmers to support the finding that a discovery existed on the placer claims were fire clay and ceramic glaze. Testimony was given by Zimmers that the clay on the property could be fired and that the resulting product was of a quality equivalent to fire clay. He also testified that the glazes produced were aesthetically pleasing. He could not give any indication of its purity. Evidence was introduced to demonstrate the market price of similar products. He could not, however, demonstrate that the specific products located on the claims could, in fact, be sold and gave no indication of the cost of production and upgrading the product to commercial quality. United States v. Vaughn, 56 IBLA 247 (1981); cf. United States v. Gibbs, 13 IBLA 382 (1973).

Forest Service regulations provide that a notice of intention to operate is required from any person proposing to conduct mining operations which might cause disturbance of surface resources within a national forest. 36 CFR 228.4(a). An exception to this requirement is those cases where the operation will not involve the use of earthmoving equipment and will not involve the cutting of trees. 36 CFR 228.4(b). Appellants have not submitted mining plans to the Forest Service and appellants stated that it is not their intent to conduct the operations in a manner which will require them to file a notice of intention (Statement of Reasons at 3). On the other hand, appellants state that it will be necessary to use trucks and other mechanized equipment to remove the clay deposit from the property for bulk processing. We do not find sufficient evidence to justify a discovery on the basis of a nonmechanized operation and do not believe that a "discovery" is supported by this planned mining method. In fact, the only way that we can find that the product could be removed at a "profit" without use of mechanized equipment would be to remove the material in conjunction with the proposed school. The mining operation must support itself and cannot be justified as an ancillary part of another business. See United States v. Mt. Pinos Development Corp., 75 I.D. 320 (1968); United States v. Springer, 8 IBLA 123 (1972), aff'd, United States v. Springer, 478 F.2d 43 (9th Cir. 1973), aff'd, United States v. Springer, 491 F.2d 239 (9th Cir. 1974), cert. denied, Springer v. United States, 419 U.S. 834 (1974).

As stated previously, the evidence clearly demonstrates that the intended use for the claims was other than for bona fide mining of minerals from the claim. The evidence presented did not demonstrate that there was sufficient mineral on the claim to justify a prudent man's expenditure of his time and means in the further development of a mine. The claims were neither located nor held for legitimate mining purposes. We therefore hold that the contestant sustained the burden of proof that there was no discovery on the claims and that the claims had not been located in good faith.

Appellants have submitted various proposed findings of fact, which have been considered by this Board. Except to the extent that they have been expressly or impliedly affirmed in this decision, they are rejected on the ground that they are, in whole or in part, contrary to the facts and law or that they are immaterial. NLRB v. Sharples Chemical, Inc., 209 F.2d 645, 652 (6th Cir. 1954).

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified.

R. W. Mullen
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Franklin D. Arness
Administrative Judge